Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

MICKY A. SMITH And J. SCOTT BROWN, *Et Al.*,

Petitioners,

V.

FORD MOTOR COMPANY, *Et Al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT
OF OKLAHOMA

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Do the 7th and 14th Amendments permit jury deliberations to be tainted by the foreman, who draws upon his professional experience to (a) present mathematical equations not offered into evidence and (b) perform an experiment for his subordinate jurors using an exhibit not offered into evidence, and another juror who (c) informs his fellow jurors about alleged federal regulations not offered into evidence or instructed upon, each of which actions (d) contradicts evidence and testimony presented at trial concerning the pivotal issue in the case, thereby (e) transforming a verdict for the plaintiffs into one for the defendants?

PARTIES TO THE PROCEEDING

Petitioners in this case are: Micky a. Smith and J. Scott Brown (Plaintiffs), as Co-Personal Representatives of the Estate of Elizabeth Ashley Smith, Deceased, and the Estate of Noah Scott Smith, Deceased, and J. Scott Brown, as Personal Representative of the Estate of Thomas Ashton Brown, Deceased; and Marcus Allen Austin (Intervenor-Plaintiff), as Independent Executor of the Estates of Milton Andrew Austin and Thelma Susie Austin.

Respondents in this case are Defendants: Ford Motor Company, a Delaware Corporation; Reynolds Ford, Inc., an Oklahoma Corporation; and Five Star Ford, Inc., an Oklahoma Corporation.

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OPINIONS BELOW

The opinion of the Oklahoma Court of Appeals is unpublished. It is reproduced in the Appendix ("App.") at 1a-24a. The Oklahoma Supreme Court did not write an opinion. Its summary order is reproduced at App. 25a.

JURISDICTION

The order of the Oklahoma Supreme Court denying certiorari was issued on February 17, 2009. This Court has jurisdiction under 28 U.S.C. §1257(a).

STATUTE INVOLVED

This appeal centers upon 12 Oklahoma Statutes §2606(B), which provides:

> Upon an inquiry into the validity of a verdict or indictment, a juror shall not testify as to any matter or statement occurring during the course of the jury's deliberations or as to the effect of anything upon the juror's mind or another juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes during deliberations. A juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or

whether any outside influence was improperly brought to bear upon any juror.

STATEMENT OF THE CASE

A. Factual Background

On July 26, 2003, Thomas Ashton Brown was driving his sister, Elizabeth Ashley Smith, and her 2-year-old son, Noah Scott Smith, to Crested Butte in a 2001 Ford Expedition, which Mrs. Smith had bought just two days earlier. While traveling at a reasonable highway speed in the westbound lane of U.S. Highway 64/87 in Raton, New Mexico, the Expedition suddenly crossed the centerline and was struck by a 2000 Ford F-250 long bed pickup, which was towing a fifth-wheel trailer. The force of the collision caused the Expedition to reverse course and roll over, and the pickup to burst into flames, resulting in the deaths of all three occupants of the Expedition, as well as the occupants of the pickup, Milton Andrew and Thelma Susie Austin. [*Petition*; *Amended Petition in Intervention*; Tr. Vol. 11, pp. 1317-1328; Tr. Vol. 35, p. 5050, l. 19 to p. 5051, l. 3]

B. Proceedings Below

Petitioners asserted various claims against (a) Ford Motor Company as the manufacturer of the Expedition, (b) Reynolds Ford, Inc., which sold the Expedition to Micky and Elizabeth Ashley Smith, and (c) Five Star Ford, Inc., which last serviced the Expedition.

At trial Petitioners proved that, at 24,000 miles (March 2003), a mechanic at Five Star Ford replaced the outer bearings on the *right* front wheel of the Expedition because they were pitted. He also noted that the bearings on the *left* front wheel were loose, but he did not use a dial indicator to ascertain the amount of looseness (Tr. Vol. 13, p. 1566, l. 1 to p. 1568, l. 16, p. 1590, l1 to p. 1593, l. 5 and p. 1594, ll. 1-5; Tr. Vol. 14, p. 1747, ll. 1-22). Though he did not replace the left front bearings, he wrote on the work order that he had done so (Tr. Vol. 13, p. 1568, ll. 13-15, p. 1579, ll. 6-19, and p. 1582, l. 8 to p. 1586, l. 15). Thus, when the original owner of the Expedition asked specifically if the left front bearings had been replaced, Five Star assured her they had been (Tr. Vol. 14, p. 1780, ll. 22-5 and p. 1792, ll. 1-4). No one at Reynolds or Five Star advised the original owner to bring the Expedition in for a 30,000-mile checkup, at which time either dealership would have routinely checked all wheel bearings (Id., p. 1780, ll. 9-18). When Micky Smith and his wife went to Reynolds Ford to purchase a pre-owned vehicle on July 24, 2003, the Expedition was sitting almost directly beneath a banner that advertised "Quality Checked," and the salesman assured them that the Expedition was in "mint condition." [Tr. Vol. 15, p. 1979, l. 1976, l. 22 to p. 1981, l. 3; Tr. Vol. 21, p. 2974, l. 23 to p. 2975, l. 4; p. 2977, ll. 2-21 and p. 2997, ll. 5-16] A "Quality Checked" vehicle undergoes a comprehensive, 115-point inspection that is performed only by Ford-certified mechanics (Tr. Vol. 14, p. 1826, ll. 4-12). Even though the Smiths bought the most expensive warranty-extension package available, the only type of inspection they got was a

so-called "multipoint" inspection: whoever was available (certified or not) performed an "eyeball" check of fluid levels, belts and hoses (Tr. Vol. 15, p. 1904, l. 5 to p. 1905, l. 18; p. 1938, ll. 7-13 and p. 1986, ll. 1-20; Tr. Vol. 23, p. 3268, l. 1 to p. 3271, l. 6).

The tapered roller bearing in the left front wheel of the subject Expedition was invented by Henry Timken over a century ago, and The Timken Company has been producing them ever since (Tr. Vol. 28, p. 3960, ll. 4-20). Anthony Skipper, General Manager of Quality and Technical Standards for The Timken Company, testified: (a) bearing failure can adversely affect the performance of the wheel, as well as the effectiveness of the brakes (Id., p. 4026, ll. 7-21); (b) a dial indicator should be used to check bearings for unusual wear (Id., p. 4029, l. 15 to p. 4031, l. 3); (c) bearings should not get loose under normal conditions (Id., p. 4034, ll. 3-13) and (d) improperly setting the bearings at the factory will lead to premature damage at 24,000 miles (Id., p. 4089, l. 14 to p. 4090, l. 1). Mr. Skipper's testimony (a) confirmed the opinions of Petitioners' experts on these subjects (Tr. Vol. 16, p. 2101, l. 7 to p. 2102, l. 3 and p. 2106, l. 24 to p. 2107, l. 2; Tr. Vol. 17, p. 2342, l. 18 to p. 2343, l. 15, p. 2345, ll. 1-24, and p. 2361, l. 16 to p. 2363, l. 7; Tr. Vol. 18, p. 2516, l. 23 to p. 2518, l. 2; and Tr. Vol. 20, p. 2818, ll. 1-14 and p. 2833, l. 1 to p. 2834, l. 2) and (b) corroborated fact testimony of employees for Reynolds and Five Star (Tr. Vol. 13, p. 1579, l. 25 to p. 1581, l. 3; and p. 1593, l. 15 to p. 1594, l. 10; Tr. Vol. 14, p. 1647, l. 6 to p. 1648, l. 12 and p. 1690, ll. 10-15; Tr. Vol. 15, p. 1910, ll. 12-18; Tr. Vol. 23, p. 3300, l. 10 to p. 3301, l. 12).

Among other things, Petitioners also proved: (a) in 1998, Ford's Critical Concern Review Group was aware of a wheel bearing failure rate of 25% (Tr. Vol. 19, p. 2551, l. 1 to p. 2563, l. 23); (b) prior to this accident, customers had made no less than 2,742 separate warranty complaints for failed bearings in Ford light trucks (Tr. Vol. 19, p. 2606, ll. 8-21; Tr. Vol. 35, p. 5062, ll. 8-12); and (c) this accident was precipitated by a pre-collision fatigue failure of the left front wheel bearings, which caused the Expedition to veer left uncontrollably (Tr. Vol. 17, p. 2298, l. 13 to p. 2299, l. 16, p. 2349, ll. 6-25, p. 2371, l. 4 to p. 2372, l. 2, and p. 2378, l. 8 to p. 2380, l. 2; Tr. Vol. 18, p. 2418, l. 21 to p. 2423, l. 25).

Experts on both sides of the case agreed that: (a) the 3:1 weight ratio between the vehicles, which resulted in the F-250 shoving the Expedition back 29 feet, rendered this an extremely violent collision (Tr. Vol., 16, p. 2043, l. 21 to p. 2046, l. 14 and p. 2058, ll. 1-9; Tr. Vol. 26, p. 3677, ll. 9-22 and p. 3693, l. 11 to p. 3696, l. 15; Tr. Vol. 29, p. 4126, ll. 1-6); (b) the metal used in wheel bearings is the hardest metal used in a motor vehicle (Tr. Vol. 17, p. 2329, ll. 18-24; Tr. Vol. 18, p. 2400, ll. 1-12; Tr. Vol. 29, p. 4123, ll. 10-13); (c) **the *right* front wheel bore the brunt of the impact with the F-250, thereby suffering a massive amount of damage** (Tr. Vol. 16, p. 2096, ll. 13-19 and p. 2111, l. 21 to p. 2112, l. 9; Tr. Vol. 17, p. 2302, ll. 3-12 and p. 2319, l. 14 to p. 2320, l. 17; Tr. Vol. 26, p. 3644, ll. 11-19, p. 3647, ll. 9-11, p. 3649, l. 24 to p. 3650, l. 23, p. 3662, l. 18 to p. 3663, l. 4, p. 3679, l. 22 to p. 3680, l. 4 and p. 3697, l. 2 to p. 3698, l. 5; Tr. Vol. 27, p. 3785, ll. 4-5, p. 3816, l. 8 to p. 3819, l. 24; Tr. Vol. 30, p. 4227, ll. 1-24); (d) **by**

contrast, the *left* front wheel suffered such little impact damage that, except for the fractured bearings, it remained drivable (Tr. Vol. 16, p. 2061, l. 3 to p. 2062, l. 2, p. 2065, ll. 18-20 and p. 2227, ll. 4-9; Tr. Vol. 17, p. 2321, l. 15 to p. 2322, l. 7; Tr. Vol. 27, p. 3814, ll. 4-25, p. 3815, l. 12 to p. 3816, l. 4, p. 3874, l. 24 to p. 3875, l. 3 and p. 3886, ll. 15-18; Tr. Vol. 30, p. 4227, l. 25 to p. 4228, l. 7); (e) **the *right* front wheel bearings were not even cracked by this savage impact, let alone broken** (Tr. Vol. 17, p. 2325, l. 15 to p. 2326, l. 1 and p. 2329, ll. 2-17; 30, p. 4225, ll. 7-11; Tr. Vol. 32, p. 4538, ll. 6-14); and (f) **neither the combined personal experience of these experts nor the decades of scientific testing performed by Ford and other automotive entities produced a single real-world instance of wheel bearings being fractured by a vehicular collision** (Tr. Vol. 16, p. 2225, l. 4 to p. 2226, l. 5; Tr. Vol. 17, p. 2326, ll. 1-21; Tr. Vol. 20, p. 2838, l. 22 to p. 2840, l. 19; Tr. Vol. 27, p. 3881, ll. 11-22; Tr. Vol. 32, p. 4549, l. 5 to p. 4551, l. 18).

The entire case turned upon this vast incongruity between the forces that acted upon the right and left front wheels (Tr. Vol. 18, p. 2398, l. 4 to p. 2399, l. 13), a disparity that was quite apparent to any casual observer (Plaintiffs' Exhibits 161.9 & 161.10; Tr. Vol. 20, p. 2925, ll. 15-25). In an attempt to divert the jurors from such obvious facts, Respondents argued that the bearings in the left front wheel fractured, not at the point of impact between the Expedition and the F-250 (where the laws of physics dictate that the forces were at their peak), but when it hit the ground (not pavement, but

dirt and grass) during the rollover (at which point most of the energy of the initial collision had dissipated) (Tr. Vol. 25, p. 3573, l. 5 to p. 3574, l. 13; Tr. Vol. 27, p. 3807, ll. 5-7; Tr. Vol. 31, p. 4454, ll. 8-18). So untenable was this position that it caused Respondents' expert on metallurgy to: (a) reverse his position on the possible causes of *brinell* marks (telltale signs of metal fatigue) after Appellants' expert had performed a simple demonstration on rebuttal (Tr. Vol. 29, p. 4132, ll. 12-14 and p. 4134, ll. 13-21; Tr. Vol. 33, p. 4605, l. 18 to p. 4607, l. 17 and p. 4710, ll. 3-6); (b) stumble all over himself when asked to explain his theories in light of contradictory physical evidence (Tr. Vol. 30, p. 4232, ll. 16-24, p. 4234, l. 15 to p. 4236, l. 9, p. 4240, ll. 5-11 and p. 4258, l. 19 to p. 4259, l. 8); (c) defy the metallurgical findings of The Timken Company itself (Id: p. 4292, l. 2 to p. 4293, l. 5; p. 4297, l. 23 to p. 4298, l. 9; and p. 4334, ll. 5-15); and (d) disregard the procedures Timken recommends for investigating bearing failures (Id., p. 4295, l. 17 to p. 4297, l. 22).

The key to resolving the controversy was to understand what happens when bearings fail (*e.g.*, what damage they cause, what marks they leave, etc.). The housing that contains the bearings at issue is called a "race." The race in the left front wheel of the Expedition bore a 180-degree crack on both sides (Tr. Vol. 29, pp. 5-13). Petitioners' metallurgy expert testified that such a symmetrical crack can only be caused by the gradual process of fatigue failure in the bearings over time (Tr. Vol. 18, p. 2420, l. 2 to p. 2423, l. 5). **Respondents' expert was unable to rebut this evidence; though he performed multiple drop-tower tests on identical bearing**

assemblies, he was unable to produce a crack on both sides of the race with localized impacts (Tr. Vol. 29, p. 4181, l. 1 to p. 4183, l. 3, p. 4186, l. 20 to p. 3, p. 4193, l. 20 to p. 4194, l. 1; Tr. Vol. 30, p. 4320, l. 24 to p. 4321, l. 9, p 4331, l. 7 to p. 4332, l. 18).

When the jurors focused solely upon the evidence presented at trial, the majority favored a verdict for Petitioners (New Trial Hrg., p. 188, ll. 13-17) until Foreman Melton twisted a nearby soup or beverage can ("tin-can") on his arm to show a symmetrical, 180-degree mark (Id: p. 62, ll. 3-18; p. 117, l.7 to p. 119, l. 20; p. 125, l. 25 to p. 126, l. 4). Mr. Melton, an airplane mechanic (Id., p. 51, ll. 20-24), then devised mathematical equations and conducted a seminar on force vectors to convince his subordinate jurors of something Respondents' expert (an engineer with a Ph.D. in Theoretical and Applied Mechanics since 1979) had failed to prove – that the only way the subject bearings could have fractured was by impact (Id., p. 39, ll. 19-23; p. 41, ll. 10-12; p. 42, ll. 13-17; p. 44, ll. 12-17; and, p. 46, ll. 11-16 and ll. 22-24). So proud was Foreman Melton of his coup that he bragged:

> A – "If I or Mr. Crane were not on the jury, they, the plaintiff, could have won." [Id., p. 173, ll. 20-21]

For his part in the coup, from reading he had done outside of trial and deliberations while employed as a mechanic, Mr. Crane testified to his fellow jurors that government regulations required

the use of a dial indicator only in response to incidents of wheels coming off tractor-trailers and causing injury (New Trial Hrg: p. 120, ll. 12-16 and l. 24 to p. 121, l. 22; p. 129, l. 24 to p. 130, l. 17). Juror Crane used this extraneous information to buttress his argument that dial indicators were generally not required for passenger cars (Id., p. 122, ll. 17-25). Foreman Melton confirmed that no testimony was presented at trial concerning these alleged industry regulations (Id., p. 123, ll. 11-21). It was only after Foreman Melton and Juror Crane injected their extra-record testimony into deliberations that the vote swung toward Respondents (Id., p. 157, ll. 6-17 and p. 173, ll. 19-25) and the jury delivered a defense verdict.

The trial court denied Petitioners' motion for a new trial. The Oklahoma Court of Appeals affirmed ("Oklahoma Decision"), concluding that the actions of Foreman Melton and Juror Crane did not rise to the level of "extraneous prejudicial information" or "outside influence" contemplated by 12 O.S. 2002 §2606(B), despite Foreman Melton's testimony that these actions materially altered the verdict:

> There is no evidence suggesting that any of the jurors here brought any outside materials into the deliberations, nor were any improper independent experiments performed. [App., p. 8a]
>
> Oklahoma law is clear that a juror's own experience and background does not constitute "extraneous prejudicial

> information," which would improperly impact a jury's verdict. Rather, "extraneous prejudicial information" is that which is "information injected into the deliberation process *from the outside*." [Id., p. 9a; citations omitted]

The Oklahoma Supreme Court denied certiorari (Id., p. 25a), thereby ratifying the decision and reasoning of the lower appellate court.

REASONS TO GRANT THIS PETITION

I. The Constitutional Right to a Fair and Impartial Jury is under Assault by Agenda-Driven Jurors

The right to have one's claims tried by a fair and impartial factfinder has been called "one of the pillars of due process". [*ESSO Standard Oil Co. (Puerto Rico) v. Mujica Cotto*, 327 F.Supp.2d 110, ¶8 (D. Puerto Rico 2004), affirmed 389 F.3d 212] This right applies with equal force in civil trials. [*Marshall v. Jerrico, Inc.*, 446 U.S. 238, ¶1 (C.A.10 Colo. 1980)]

In *Skaggs v. Otis Elevator Co.*, 164 F.3d 511 (C.A.10 Okla. 1998), the court held:

> Although the Seventh Amendment does not contain language identical to that found in the Sixth Amendment ... the right to a jury trial in a civil case would

> be illusory unless it encompassed the right to an impartial jury. [Id., ¶3]
>
> [The] denial of trial by an impartial jury is also the denial of due process...." [Id.; Quoting *Casias v. United States*, 315 F.2d 614, 615 (10th Cir. 1963) (*en banc*)]

It is a longstanding rule of law that, if a juror would ignore jury instructions or evidence in favor of her own agenda, she is unfit for duty. Thus, in *Morgan v. Illinois*, 504 U.S. 719 at ¶11 (1992), this Court held that a juror who was prepared to impose the death penalty without considering mitigating factors was removable for cause. Likewise, the court in *U.S. v. Wilson*, 493 F.Supp.2d 415 at ¶5 (E.D.N.Y. 2006), declared removable for cause a juror whose bias in favor of political minorities "indicates that he is unduly influenced by popular culture and stereotypes". And in *U.S. v. Parker*, 133 F.3d 322 at ¶9 (C.A.5 La. 1998), the court affirmed the removal of a juror who admitted that a family member's recent criminal conviction would cloud his view of the evidence.

In 2002, Trent Hammerstein wrote a book titled "Stealth Juror – The Ultimate Defense Against [*sic.*] Bad Laws and Government Tyranny" (Paladin Press) in which he openly encourages his readers to (a) lie during *voir dire* to get themselves impaneled and then, during deliberations, (b) ignore the evidence and jury charges in favor of their own agenda. Suffusing the book is an almost rabid suspicion of trial judges based primarily on their role

in excluding inadmissible evidence. Though the author's stated concern is limited to criminal defendants, one needs no imagination to discern the impact stealth jurors inspired by the following battle cries are having on civil trials:

> Technically, lying on a voir dire form is a felony. [text omitted]
>
> In my opinion, in some cases you have a moral and ethical right to lie .... [Id., p. 51]

> So at the beginning of the trial, when you are forced to take an oath to obey the judge's instructions (which he really doesn't have the right or power to give), just nod, mouth the words you're told to, and mentally cross your fingers, because the judge will almost always make you promise to obey his instructions, even over your own conscience or feelings. [Id., pp. 56-7]

> The first thing to do in the jury room is try to get yourself elected foreman, forewoman, foreperson, or whatever they call it. [Id., p. 74]

> [The judge's jury instructions] are generally invalid and improper no matter how many judges say they aren't because the jury, not the judge, is the final arbiter of guilt or innocence. [Id., p. 75]

Finally, some subject headings in his chapter titled "What You Can Do to Fix the System Even if You're Never on a Jury" are "Establish Citizen Oversight Panels to Control Judges", "Drastically Reduce the Power of Judges" and "Strictly Limit the Voir Dire Process".

The "stealth juror" movement has gained such ground that it prompted Dan Abrams (host of *Abrams Report*) to address it on April 2, 2004. In a segment titled "Runaway Jury", Phillip Anthony, a jury consultant with VisionQuest, referred to the O.J. Simpson murder trial as a watershed event for jury behavior: "The lightbulb went on for a lot of folks that if they ended up being selected as a juror, it could be an opportunity to engage in some form of social engineering." Later in the piece, he added: "Usually, they've experienced something personally that causes them to want to put forward their agenda."

Whether we label them "stealth" or "activist," jurors who ignore jury instructions and evidence in favor of their own agenda are anathema to fundamental due process. Because such jurors are schooled by the above referenced book – and web sites such as www.fija.org – in ways to evade detection, often the only way to uncover them is to (a) analyze the effect they had on a verdict after that verdict has been delivered by (b) delving into the objective facts of what was said and done behind the closed door to the jury room.

II. The Oklahoma Decision Conflicts with Other State Supreme Courts on the Interpretation of "Extraneous Prejudicial Information"

The Oklahoma Decision restricts the scope of "extraneous prejudicial information" to a physical object brought into the jury room and information gleaned from an experiment or research a juror performs (a) independently of the other jurors and (b) outside the jury room. Petitioners submitted below that this interpretation improperly shifts the focus of Rule 2606 from the courtroom to the jury room.

In *Tanner v. U.S.*, 483 U.S. 107 at ¶1 (1987), this Court held that drug use and intoxication did not qualify as extraneous information under Fed. R. Civ. P. Rule 606(b). Yet this Court recognized that the act of sharing extraneous information did not have to occur outside the jury room to so qualify (Id. at 117-18). If the sharing of extraneous information can occur inside the jury room, it follows that the extraneous information itself may also originate there. Thus, in *State v. Thacker*, 596 P.2d 508 at ¶3 (Nev. 1979), a new trial was granted when the jury foreman, a cattle ranch superintendent, calculated the estimated original weight of calves being held in impound. Defendants, accused of stealing the calves at issue, alleged that the calves impounded were not the same as those allegedly stolen, because the former were smaller. [Id.] It is notable that the foreman performed his calculations (a) during deliberations (b) in direct response to a question that arose as to the weight of the calves, which (c) "was a

fact critical to respondents' case." [Id.] Furthermore, the foreman's calculations had a material impact on the verdict. [Id., fn. 1] In affirming the grant of a new trial, the court held:

> It is likewise a fundamental principle that in reaching their verdict, jurors are confined to the facts and evidence regularly elicited in the course of the trial proceedings. [Id., ¶2]
>
> The **unsworn testimony of a juror** as to a fact which is relevant to the determination of an issue before the jury constitutes misconduct in itself. [Id.; citation omitted; emphasis added]

In the case at hand, Foreman Melton performed his mathematical computations and tin-can experiment to convince his subordinate jurors of his theory regarding how the forces of the collision must have acted on the wheel bearings, contrary to the sum of evidence presented at trial. Thus, had Petitioners' appeal been filed in Nevada rather than Oklahoma, a new trial would certainly have been granted based on this misconduct.

In *Mariner Health Care, Inc. v. Estate of Edwards ex rel. Turner*, 964 So.2d 1138 (Miss. 2007), a juror's relative was a resident of the defendant nursing home. That juror told other jurors that, if the relative received poor care, so did the plaintiff. The trial court denied defendant's new trial motion. The court reversed, holding:

> A new trial is appropriate only when the jury received facts that concern a material issue in dispute and they are qualitatively different from the evidence admitted at trial. [Id. at 1146; citations omitted]

In the present case, Juror Crane injected into deliberations an alleged body of federal regulations he recalled from working as a mechanic (a) outside the jury room and (b) prior to the trial. This fact which he imparted to the other jurors directly contradicted expert testimony on the material issue of whether a dial indicator should be used to check wheel bearings in passenger vehicles. Such conduct would have qualified as "extraneous prejudicial information" in Mississippi.

In *Brockie v. Omo Const., Inc.*, 844 P.2d 61 (Mont. 1992), plaintiff's deceased slid into a flasher board placed on the roadway by a construction crew. The location of the flasher board was critical to the case – were it proved to be within 30 feet of the roadway, defendant would be in violation of a highway safety standard. The defendant's reconstruction expert testified that the board must have been 34-48 feet away, based on motion theory and kinematics. The plaintiff relied on the measurements taken at the accident scene by an investigating trooper which placed the board at 27 feet 2 inches from the centerline. [Id. at 63] To "refresh his memory" on physics courses he had taken in college, the jury foreman ("Rice") went to the local

library and did his own research on motion theory and kinematics. During deliberations, he told his subordinate jurors that his weekend research confirmed the testimony of the defendant's expert. [Id.] The court held that this research affected the plaintiff's rights:

> ...for any statements by Rice in the jury room relative to the placement and positions of the sign, [*sic.*] could in effect **make Rice a witness as to those jurors** to whom he mentioned his research. [Id. at 64-5; emphasis added]

In *Pennell v. Keene Brothers Trucking, Inc.* [589 So.2d 965 (Fla. App. 2 Dist. 1991), reversed on other grounds, 614 So.2d 1083 (Fla. 1993)], while calculating damages in deliberations, a juror utilized information from one page of an accounting book that was not in evidence (Id. at 966). The court held:

> A juror is not permitted to **become a witness in the jury room by importing [*sic.*] his knowledge** to other jurors. Under the circumstances in this case, the trial court was correct in granting a new trial on the ground of juror misconduct. [Id. at 967; citation omitted; emphasis added]

In the case at bar, Foreman Melton made himself an unsworn witness to the other jurors when he utilized his own specialized knowledge of physics, gathered outside the jury room, to rehabilitate

Respondent Ford's expert on the pivotal issue of what caused the bearings to fracture. Juror Crane did the same when he introduced the alleged federal regulations. The only difference between their acts of misconduct and that which occurred in *Brockie* (844 P.2d 61) is that Messrs. Melton and Crane did not amass their extra-record knowledge *during the trial.* Even so, regardless of when or where they obtained the knowledge, the fact remains that they (a) disclosed this extra-record evidence to their fellow jurors (b) without affording Respondents an opportunity to challenge or cross-examine it.

Appellate law is replete with cases holding that it is prejudicial misconduct for a juror to perform an experiment and divulge her findings to the other jurors. [*Wilson v. Vermont Castings*, 977 F.Supp. 691, 695 (M.D. Pa. 1997)] Petitioners submit that it is insignificant to our analysis where or in whose presence such an experiment is conducted. Rather than sneak away to a dark corner and perform the tin-can experiment, Foreman Melton simply conducted it in the jury room for all to see. The result in either scenario is the same: an unauthorized experiment has poisoned the jury's verdict. The Supreme Court of Montana appreciates this simple logic; its sister court in Oklahoma does not.

In *Saucedo v. Winger, M.D.*, 850 P.2d 908 (Kan. 1993), the court ruled that a juror's statement to other jurors regarding an unsubstantiated rumor that the decedent in a medical malpractice case may have suffered a cocaine overdose constituted misconduct:

> [I]t is the duty of the jury to make its findings upon evidence regularly introduced in the trial and not upon the **personal knowledge of jurors.** [Id. at 914; emphasis added]

> [I]f facts outside of the evidence are brought before the jury based on the **personal knowledge** of a juror and those facts are likely to have influenced the minds of the other jurors, the verdict should be set aside. [Id.; emphasis added]

> A party is denied the right to a fair trial when a juror introduces **evidence on material issues of fact** to the jury during its deliberations. [Id. at 919; emphasis added]

It is notable that the highest courts of Tennessee and Colorado have held that the introduction of the Bible and/or citing biblical references during deliberations constitute prejudicial misconduct. [*State of Tennessee v. Harrington*, 627 S.W. 2d 345, 350 (Tenn. 1981); *People v. Harlan*, 109 P.3d 616 at ¶11 (Colo. 2005)] The fact that, in Western society, exposure to biblical passages is within the personal experience of an overwhelming majority of potential jurors provides a stark contrast to the reasoning put forth in the Oklahoma Decision on the subject of a juror's personal experience and background.

A common thread among all of these State cases is that, regardless of when or where a juror's specialized knowledge is garnered, and regardless of whether it may be characterized as personal or professional, if (a) the juror communicates to his fellow jurors a fact that was not placed into evidence and (b) that fact bears on a material issue in the case, "extraneous prejudicial information" has infected the jury's verdict. In other words, these cases instruct that Rule 2606(B) is properly read in the following context:

> A juror may testify on the question whether [prejudicial information extraneous to the trial process] was improperly brought to the jury's attention or whether any [influence outside of the trial process] was improperly brought to bear upon any juror.

Finally, in *Buisker v. Thuringer*, 648 N.W.2d 817 (S.D. 2002), the court set forth the last element of inquiry in juror misconduct analyses:

> **... whether the extraneous matter had a tendency to influence the jury in arriving at its verdict in a manner inconsistent with the evidence** and the instructions of the court. [Id. at ¶12; emphasis added; citation omitted]

In the case at hand, the facts are conclusive that Foreman Melton and Juror Crane used their influence to procure a verdict that is diametrical to the evidence presented at trial.

CONCLUSION

Though Foreman Melton could never have qualified as an expert in metallurgy, and though Juror Crane could never have qualified as an expert on industry regulations or how to detect loose bearings, both were allowed to testify before their fellow jurors on these subjects. Though the Oklahoma court would have reversed if this testimony were admitted during the trial, the Oklahoma court has affirmed when the same testimony was introduced during deliberations – unsworn and in secret.

The Oklahoma Decision's interpretation of "extraneous prejudicial information" perpetuates a conflict among the States on a federal question that lies at the heart of the 7th and 14th Amendments. While a jury's verdict should be protected from excessive outside attacks, courts should with equal vigilance guard against verdicts that are tainted from within by jurors who are both predisposed *and trained* to not only ignore a court's instructions but manufacture evidence in the jury room, away from the court's discerning eye and immune to cross-examination. Therefore, Petitioners ask that this Petition be granted.

Respectfully Submitted,

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May 15, 2009

APPENDIX

APPENDIX A

NOT FOR OFFICIAL PUBLICATION

IN THE COURT OF CIVIL APPEALS
OF THE STATE OF OKLAHOMA
DIVISION III

[Filed Nov 7, 2008]

Case No. 104,134

MICKY A. SMITH and J. SCOTT BROWN as Co-Personal Representatives of the ESTATE OF ELIZABETH ASHLEY SMITH, Deceased, and the ESTATE OF NOAH SCOTT SMITH, Deceased; and, J. SCOTT BROWN, as Personal Representative of the ESTATE OF THOMAS ASHTON BROWN, Deceased,

Plaintiffs / Appellants,

and

MARCUS ALLEN AUSTIN, as INDEPENDENT EXECUTOR of the ESTATES of MILTON ANDREW AUSTIN and THELMA SUSIE AUSTIN,

Intervenor-Plaintiff / Appellant,

vs.

FORD MOTOR COMPANY, a Delaware corporation; REYNOLDS FORD, INC., an Oklahoma corporation; and FIVE STAR FORD, INC., an Oklahoma corporation,

Defendants / Appellees.

APPEAL FROM THE DISTRICT COURT OF
CLEVELAND COUNTY, OKLAHOMA
HONORABLE TOM A. LUCAS, JUDGE

AFFIRMED

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MICHAEL L. CARR, MICHELLE B. SKEENS,
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Five Star Ford, Inc.

OPINION BY BAY MITCHELL,
VICE-CHIEF JUDGE:

Plaintiffs/Appellants Mickey A. Smith and J. Scott Brown, as Co-Personal Representatives of the Estate of Elizabeth Ashley Smith, deceased, and the Estate of Noah Scott Smith, deceased, and J. Scott Brown, as Personal Representative of the Estate of Thomas Ashton Brown, deceased (Plaintiffs), and Marcus Allen Austin, as Personal Representative of the Estates of Milton Andrew Austin and Thelma Susie Austin, deceased (intervenor), collectively "Appellants," appeal from an Order denying their Motion for New Trial subsequent to a jury verdict in favor of Defendants/Appellees Ford Motor Company and Reynolds Ford, Inc. (Ford Defendants) in a wrongful death/manufacturer's products liability action arising from an automobile collision.[1] The Appellants' primary contention is that specific acts of juror misconduct

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[1] Plaintiffs and Intervenor (collectively "Appellants") filed a combined brief-in-chief on appeal. They sought permission to file a 60 page brief, which was granted by the Oklahoma Supreme Court in its June 4, 2007 Order. Appellees Ford Motor Company and Five Star Ford, Inc. likewise filed a joint answer brief and obtained permission to file a 60 page brief. Reynolds Ford filed a separate answer brief. Appellants filed a Motion to Retain Appeal in Supreme Court, which was denied by Order of the Oklahoma Supreme Court on January 19, 2007.

resulted in the defense verdict requiring reversal.[2] Additionally, Appellants argue the trial court erred by (1) giving certain jury instructions and refusing to give others; (2) admitting certain statements (identified by the parties as "dying declarations") of the deceased Thomas Ashton Brown to emergency personnel prior to his death; (3) failing to strike the testimony of expert witness Robert Pascarella; (4) granting Reynolds Ford's Motion for Summary Judgment on the issue of its negligence; and (5) by refusing to permit Appellants' expert witnesses to testify regarding items not in evidence.

Facts and Procedural History

This action arose from a motor vehicle accident that occurred on July 26, 2003 on U.S. Highway 64/87 in New Mexico. Thomas Ashton Brown was driving a 2001 Ford Expedition, in which his sister, Elizabeth Ashley Smith and her 2-year-old son, Noah Scott Smith, were riding as passengers. The record reflects that Thomas Ashton Brown crossed the centerline into the opposing lane and struck an oncoming Ford F-250 pick-up truck, which was towing a trailer. Milton Andrew and Thelma Susie Austin occupied the pick-up truck. The collision, which was

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[2] Appellants filed a Motion for Oral Argument, which they argue is necessary in this case for them to more fully address juror misconduct and the particular defect at issue in this action." Appellants further contend the Oklahoma case law on juror misconduct is not well-developed. Appellees have each filed Objections to Appellants' Motion for Oral Argument respectively, noting the sufficiency of Oklahoma law on the subject of juror misconduct as well as the sufficiency of the parties' appellate briefs on all issues. We find the issues have been adequately briefed and oral argument would not materially assist the Court. *See Fulsom v. Fulsom*, 2003 OK 96, n. 10, 81 P.3d 652. Therefore, Appellants' Motion for Oral Argument is denied.

nearly head-on and occurred while both vehicles were traveling at highway speed, tragically resulted in the death of all five individuals in both vehicles.

Alleging that a defect in the Expedition caused the accident and resulting deaths, Appellants asserted claims against Ford Motor Company as the manufacturer of the Expedition, Reynolds Ford, Inc., the dealer which sold the Expedition to Micky and Elizabeth Ashley Smith, and Five Star Ford, Inc., which had serviced the Expedition. Micky and Elizabeth Ashley Smith had purchased the Expedition from Reynolds Ford in Norman, Oklahoma two days prior to the subject collision.

Prior to trial, Reynolds Ford, Inc. filed a Motion for Summary Judgment on the issue of negligence, which the trial court granted. Subsequently, the case proceeded to trial against the remaining Ford Defendants on the theory of a defective bearing and/or a missing cotter pin (a.k.a. cotter key) on the left front wheel of the Expedition, which allegedly caused the Expedition to veer left uncontrollably. Ford Defendants presented evidence that the accident was caused by driver negligence and not by a defect in the vehicle. After receiving instructions and deliberating for two days, the jury returned a verdict in favor of Ford Defendants on all claims. Specifically, the jury found that the negligence of the driver Thomas Ashton Brown was the sole and direct cause of the accident and they attributed 100% of the negligence to him. Additionally, the jury found the 2001 Expedition did not have a defect and was not unreasonably dangerous, the Ford Defendants were not negligent in its design or manufacture of the Expedition, and Five Star Ford was not negligent in its inspection and repair of the Expedition. The trial court subsequently

entered judgment in favor of all Defendants on September 21, 2005.

Plaintiffs and Intervenor thereafter filed a Motion for New Trial, arguing juror misconduct as a primary basis for the Motion. Despite Defendants' objections, a hearing was held during which several jurors testified to determine whether "extraneous prejudicial information" was improperly considered by the jurors during deliberation in violation of 12 O.S. 2001 §2606(B). The trial court denied the Motion for New Trial based upon a finding that the jurors "simply discussed the evidence as they understood it based on their knowledge and experience." Appellants appeal from the denial of their Motion for New Trial.

Standard of Review

"A trial court is vested with broad legal discretion in granting or denying new trial, and unless it clearly appears that the trial court erred in some pure simple question of law or acted arbitrarily, its judgment will not be disturbed on appeal." *Dominion Bank v. Masterson*, 1996 OK 99, ¶16, 928 P.2d 291, 294 (emphasis added).

The trial court's determination of no juror misconduct was free of error.

Appellants contend that jurors, and particularly the jury foreman, committed acts of misconduct constituting prejudicial error in this case. Specifically, Appellants complain that the jury foreman, who was an aircraft and auto mechanic, improperly introduced his own "expert testimony" into the deliberations by demonstrating a theory of how damage to the subject wheel bearing occurred during the impact of the accident. He used a "tin can analogy" based upon his own mechanical knowledge and expertise to explain how

various components fit and work together. Appellants characterize the foreman's conduct during deliberations as the equivalent of improper outside influence and/or evidence presented to the jury outside the courtroom proceedings. Appellants claim two other jurors similarly injected their mechanical knowledge into the discussion in support of the foreman's theory, which further added to the alleged substantial prejudice.[3]

The trial court permitted a post-verdict hearing permitting jurors to testify concerning their internal

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[3] Appellants additionally argued in their Motion for New Trial that jury deliberation included jurors' speculation over matters outside the evidence, particularly concerning the cause of the accident, *i.e.*, that an animal may have distracted Mr. Brown, causing him to cross the center line. We note it is proper for jurors to draw inferences from the evidence and it is inevitable that in some cases inference will turn to speculation. *See Walker v. Ison Transp. Services, Inc.*, 2007 OK CIV APP 14, ¶11, 152 P.3d 894, 896, *cert. denied*. "[S]peculation is distinguishable from those instances where jurors independently and improperly introduce into deliberations matters purporting to possess evidentiary probity and weight." *Id.* Appellants' appellate brief-in-chief refers to a discussion, which may have occurred during deliberations concerning the effect a verdict might have on car prices or insurance premiums. The transcript of the hearing provides that when questioned about such a discussion, the foreman testified, "I remember something about that, but I couldn't even come close to telling you who, when, or where that was said." (Transcript of hearing, January 4, 2006, p. 135). Several other jurors testified that they had no recollection of such a discussion during deliberations. We find the evidence inconclusive whether the jury deliberations included speculation concerning the effect of a verdict on car prices or insurance premiums. Even if such speculation occurred, such speculation does not meet the standard of "extraneous information" as contemplated by §2606(B). *See Walker*, 2007 OK CIV APP 14, ¶12, 152 P.3d at 896.

deliberations and discussions in accordance with 12 O.S. §2606(B), which permits such testimony "on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror."[4] *Id.* A trial court's determination subsequent to hearing on a motion for new trial based upon a party's allegation of juror misconduct "will not be disturbed [on appeal] where there is evidence reasonably supporting such finding." *Harris v. Boggess*, 1927 OK 80, ¶0, 255 P. 685, 685-86 (Syllabus by the Court, ¶2).

Appellants cite *Willoughby v. City of Oklahoma City*, 1985 OK 64,706 P.2d 883, in support of their argument that extraneous prejudicial information or outside influence was improperly brought to bear on the jury here. They argue the jury here improperly considered outside information provided via "seminar" conducted during deliberations by the "expert" jurors, and the parties were deprived of the opportunity to cross-examine the "experts" regarding such "evidence." In *Willoughby*, a juror conducted an independent investigation which allegedly involved obtaining opinions from experts and other witnesses outside the deliberation room and thereafter providing such information to the other jurors. No such investigation outside the deliberations occurred here. The foreman testified he used the tin can analogy in order to help explain his view of the evidence presented at trial. Several jurors had no recollection of the analogy. There is no evidence suggesting that any

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[4] This statutory provision is considered the single exception to the common law rule, which bars jurors from being heard to impeach a verdict of a jury upon which he or she served. *See Walker*, 2007 OK CIV APP 14, ¶5, ¶7, 152 P.3d at 895.

of the jurors here brought any outside materials into the deliberations, nor were any improper independent experiments performed.

The record reflects the jury deliberated and reached a verdict based upon the evidence presented at trial rather than upon any improper outside influence. While Appellants complain about certain jurors' use of their personal background and experience in mechanics during deliberations, such background and experience was fully disclosed during voir dire.[5] The jurors were instructed to use their common sense, and in doing so, every juror brought his/her own set of experiences and background to the deliberations process. The mere fact that some jurors sitting on a particular jury may have experience or knowledge particularly relevant to the issues in the case does not disqualify them from active participation in deliberations, much less amount to prejudicial juror misconduct. The record discloses that deliberations in this case were conducted as they were "intended to be, and should be, private, frank, and free discussions of the questions under consideration." *Stade v. Bodycote Thermal Processing, Inc.*, 2004 OK CIV APP 70, ¶6, 99 P.3d 733, 735.

While Appellants cite much case law from outside the jurisdiction on this issue, Oklahoma law is clear that a juror's own experience and background does not constitute "extraneous prejudicial information," which would improperly impact a jury's verdict. *See*

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[5] The record discloses no attempt by Appellants to strike the alleged "expert" jurors for cause during voir dire. Generally, when a defendant fails to challenge a prospective juror for cause, he waives any subsequent claim regarding the fitness of that panelist to serve on the jury. *Harris v. State*, 2004 OK CR 1, 84 P.3d 731.

Hawkins v. State, 2002 OK CR 12, ¶45, 46 P.3d 139, 148. Rather, "extraneous prejudicial information" is that which is "information injected into the deliberation process from the outside." *Id.* (emphasis added). Where jurors, as in this case, bring their own expertise into the deliberation process, such personal experience cannot be construed as 'extraneous prejudicial information." *See Marquez v. City of Albuquerque*, 399 F.3d 1216, 1223 (10th Cir. 2005) (holding that a juror allegedly holding herself out as an expert to fellow jurors during deliberations was merely using her own personal experience, which did not constitute "extraneous prejudicial information")[6]

The record is absent any evidence of extraneous prejudicial information or outside influence on the jury to warrant the granting of a new trial. The trial court's finding that the jurors "simply discussed the evidence as they understood it based on their knowledge and experience" rather than upon extraneous prejudicial information or outside influence is supported by the evidence and Oklahoma law. The denial of Appellants' Motion for New Trial on the basis of juror misconduct is affirmed.

The Jury was properly instructed on the applicable law.

Appellants contend the trial court erred in providing certain jury instructions and refusing to provide

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[6] In *Marquez v. City of Albuquerque*, the alleged "extraneous prejudicial information" was the juror's personal experience with training police dogs and the case involved the alleged excessive use of force by the use of a police dog. *See also Hard v. Burlington N. R.R. Co.*, 870 F.2d 1454, 1462 (9th Cir. 1989) (holding that a juror's personal familiarity with reading x-rays was not extraneous prejudicial information).

others. "The test upon review of an instruction improperly given or refused is whether there is a probability that the jurors were misled and thereby reached a different result than they would have reached but for the error." *Woodall v. Chandler Material Co.*, 1986 OK 4, ¶13, 716 P.2d 652, 654. Instructions are considered as a whole to determine whether the instructions reflect Oklahoma law on the relevant issue. *Nealis v. Baird*, 1999 OK 98, ¶15, 996 P.2d 438, 444. "A judgment will not be disturbed on appeal unless it appears reasonably evident that the jury was misled by the allegedly erroneous instruction." id. If competent evidence supports the verdict, we will not disturb it because of erroneous instructions unless it appears reasonably certain that the jury was misled. *Teague v. United Truck Service*, 1972 OK 97, ¶14, 499 P.2d 380, 384.

Instruction numbers 16(A), 17 and 29

Appellants contend the trial court erred in the instructions to the jury on negligence *per se* (instruction numbers 16(A) and 17)[7] in combination with the com-

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[7] Instruction # 16A provided as follows: It is the duty of every operator of a vehicle to exercise ordinary care in keeping a lookout consistent with the safety of other persons." Instruction # 17 provided as follows:

> In addition to the duty to exercise ordinary care there are also duties imposed by statutes. If you find that Plaintiffs violated any one of the following statutes and the violation was the direct cause of the injury, then such violation in and itself would make such person negligent. There were in force and effect in New Mexico at the time of the occurrence the following statutes:
>
> (1) Upon all roadways of sufficient width a vehicle shall be driven upon the right half of the roadway, and where practicable, entirely to the right of the center thereof.

parative negligence instruction (instruction number 29). Appellants argue that because the jury was given the negligence *per se* instruction, they were given no choice but to find Mr. Brown negligent. Additionally, they argue these instructions somehow resulted in the jury not being allowed to consider a legitimate reason for Mr. Brown being in the left lane (*i.e.*, passing) or that a defect in the vehicle (the left front wheel bearing forced him there).

Preliminarily, we note the evidence reflects the propriety of a negligence *per se* instruction, given the undisputed fact the Expedition crossed the center line into oncoming traffic at the time of the accident. In New Mexico, where the accident occurred, it is illegal to drive left of the center line. *See* N.M. Stat. §66-7-308(A).[8] "[W]here either party pleads and submits proof of a violation of a statute . . . an instruction advising the jury that such violation is negligence *per se*, is proper." *Dowell, Inc. v. Layton*, 1953 OK 187, ¶27, 261 P.2d 885, 890-91. A violation of the statutory rules of the road is negligence *per se* warranting such an instruction if the injury complained of was caused by the violation, was the type intended to be prevented by the law, and the injured party was a member of the class meant to be protected by the law. *See Boyles v. Oklahoma Natural Gas Co.*, 1980 OK 163, ¶14, 619 P.2d 613, 618; *Shoopman v. Travelers Ins. Co.*, 1974 OK 6, 518 P.2d

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[8] This statute, which requires New Mexico motorists to drive on the right side of the road was intended to prevent harm such as head-on collisions or sideswiping of opposite moving traffic. *See Archibeque v. Homrich*, 88 N.M. 527, 543 P.2d 820 (explaining the impropriety of a negligence *per se* instruction in a case *not* involving a head-on-collision or sideswipe).

1108. A negligence *per se* instruction was appropriate under the facts and circumstances of this case.

The negligence *per se* and comparative negligence instructions do not mandate a finding that Mr. Brown's actions were the direct cause of the collision. The jury was instructed on the Appellants' theories of the case as well. The instructions permitted the jury to find that a defect or a mechanical failure, and not driver negligence, caused the vehicle to go left of center causing the collision. There was evidence to support such a finding. The jury, however, found otherwise. It was not imperfect instructions which caused the jury verdict in favor of Appellees. Rather, the verdict appears to have been based upon consideration of the evidence presented by all the parties and application of pertinent law as accurately communicated via the instructions. The negligence *per se* and comparative negligence instructions were given along with numerous instructions properly instructing the jury as to the Appellants' theories.[9] The instructions, considered as a whole, accurately reflect Oklahoma law and it does not appear the jury was misled thereby.

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[9] Instructions given pertinent to the Appellants' theories of recovery included as follows: #11 (burden of proof applicable to party claiming manufacturer's products liability), #12 (definition of defective product), #13 (definition of 'unreasonably dangerous"), #14 (instruction that the subject vehicle was not a "Quality Check" vehicle and "Quality Check program" is not relevant to Plaintiffs' claims), #15 (defect/direct cause/more than one direct cause), #16 (intervening cause). Additionally, general instructions regarding the law of negligence (instruction #27 and #28) were given as well as instructions on damages (instructions #18-23).

Appellants argue the trial court erred in its refusal to provide three proposed instructions, which would have allegedly prevented the jury from otherwise being misled by instructions numbers 16(A), 17 and 29.[10] Additionally, Appellants contend the trial court erred in refusing to give ten "miscellaneous instructions."[11] The instructions read to the jury, considered

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[10] The three proposed instructions were entitled "comparative negligence prohibited," "contributory negligence, affirmative defense of misuse of product," "'sole' cause vs. 'superceding' cause." A review of these proposed instructions reveals they are confusing, misleading, cumulative, and/or do not instruct on law applicable in the case. In any event, we fail to see how the giving of these instructions would have prevented any confusion or misleading of the jury as to instruction numbers 16(A), 17, and 29, nor is it probable the jury would have reached a different verdict had these proposed instructions been given. The trial court correctly refused to give these instructions.

[11] Eight of the ten "miscellaneous instructions" requested by Appellants were withdrawn by counsel during the jury charge conference because they were cumulative of other instructions and/or because the instruction was no longer applicable (*i.e.*, instructions related to claims which were no longer pertinent given the Appellants' withdrawal of the particular claim). Appellants waive any review of alleged error regarding these instructions, which Appellants withdrew. *See Bane v. Anderson, Bryant & Co.*, 1989 OK 140, ¶24, 786 P.2d 1230, 1236 (providing "a party who fails to preserve an issue for appeal by objecting in a timely manner. . . to instructions given, or by neglecting to offer a proper instruction has waived review of that issue [on appeal]."). Specifically, Plaintiffs' counsel withdrew the following proposed jury instructions: (1) The Issues in the Case-No Counterclaim; (2) Product Defective if No Warning Given; (3) Adequacy of Warnings; (4) Conduct of Defendants; (5) Deceit-Elements; (6) Material Fact Defined; (7) Deceit Defined; (8) Tests of Caulfield and Pascarella. The two proposed miscellaneous instructions, which were not withdrawn by counsel and therefore, properly preserved for review on appeal are as follows: (1) Manufacturer's Knowledge as Experts; (2) Manufac-

as a whole, clearly set forth the jurors' duties, the issues in the case, the applicable law, the burdens of proof, the elements of recoverable damages, and the applicable defenses. We find the given instructions to be clear, not misleading, and incapable of being construed as precluding the jury from finding the Expedition defective and/or Ford Defendants negligent. It appears reasonably certain the jury reached its verdict (finding the percentage of negligence attributable to Mr. Brown at 100%) not on the basis of any confusion arising from the instructions, but rather upon its finding of facts and conclusions drawn from consideration of all the evidence presented at trial. No error is shown in the trial court's determinations pertaining to the jury instructions.

The proposed dying declarations instruction

The trial court allowed evidence of the dying declarations of Mr. Brown.[12] Appellants argue the admission of the dying declarations was error, and that the error was compounded when the court refused to give

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turer's Duty to Warn. These instructions are confusing, misleading, and regarding the duty to warn instruction, the refusal to give it conforms to the evidence and the fact that other instructions regarding duty to warn were withdrawn. Further, it is not probable the jury was misled and would have reached a different verdict if these instructions had been given. There was no error in refusing to give these proposed instructions.

[12] These statements were made to an emergency medical technician, who treated Mr. Brown at the scene of the accident. The emergency medical technician was deposed, wherein she testified to the content of the statements, including Mr. Brown's expression of fault for the accident (It's all my fault. It's all my fault. I'm going to die. I'm going to die I'm going to die."). A videotape of the medical technician's deposition testimony was offered for admission by the Plaintiffs at trial, and was played for the jury.

a curative instruction[13] regarding the dying declarations. We disagree.

The trial court properly admitted the statements of Mr. Brown. The statements are clearly admissible pursuant to the dying declarations exception to the hearsay rule. Title 12 O.S. Supp. 2003 §2804(B)(2) provides that "a statement made by a declarant while believing that the declarant's death was imminent, concerning the cause or circumstances of what the declarant believed to be the declarant's impending death" is not excluded by the hearsay rule if the declarant is unavailable. The statements made by Mr. Brown were to the effect he believed he was going to die and his statements concerning fault directly and clearly related to the circumstances surrounding his

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[13] The proposed dying declarations instruction entitled 'Dying Declarations of Thomas Ashton Brown" is as follows:

> You will hear testimony regarding certain statements made by decedent Thomas Ashton Brown while he was being transported by ambulance from the scene of the accident. It is up to you, as the finders of fact, to determine what weight, if any, to give to these statements. In determining the weight you should give to these statements, you should consider the context in which these statements were made, such as: (a) Mr. Brown's physical condition; and, (b) Mr. Brown's mental condition. Finally, you should consider any and all other statements he made following the accident, which, taken together, might shed light on the reliability of the statements in issue.
>
> If you decide that the statements of Thomas Ashton Brown indicate some degree of fault on his part, the laws of Oklahoma do not allow you to consider this when deciding the amount of damages to award to Elizabeth Ashley Smith or Noah Scott Smith, as they were fault-free passengers, and Milton Andrew Austin or Thelma Sue Austin, as they were the fault-free driver and passenger in a separate vehicle.

imminent death. We find no error in the trial court admitting these statements.

Regarding Appellants' proposed curative instruction, the trial court refused to give it on the basis that it was argumentative and cumulative of other instructions. Additionally, the trial court determined the proposed instruction might be construed by the jury as an improper commentary of the court on the credibility of the statement. Appellants demonstrate no prejudice in the failure to give this instruction. Furthermore, Appellants cite no authority in support of their argument that the trial court erred in refusing the requested curative instruction. Argument unsupported by persuasive authority or citation will not be considered. *Abel v. Tisdale*, 1980 OK 161, ¶18, 619 P.2d 608, 611.

The proposed "issue preclusion" instruction

Appellants contend the trial court erred in its refusal to instruct the jury on "issue preclusion based on discovery misconduct." While Appellants' Brief-in-Chief provides in exhaustive detail matters pertinent to what it refers to as "systematic discovery abuse" in the litigation of this matter, they fail to set forth specifically what instruction they contend the trial court erred in refusing to read to the jury. Although we can deduce that it relates to Appellants' Exhibit number 183,[14] which is comprised of documents relevant to an

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[14] The documents included in Plaintiffs' Exhibit #183 contained the following statements: "Cross Truck Line Action-Wheel Bearings (P131 Job #1 implementation) Problem: Current bearing design will not meet 150K Mile requirement without adjustment, noise or failure. . . . Replace current loose/adjustable wheel bearings with cartridge design with improved seal." The record reflects the trial court granted Plaintiffs' motion in limine pertaining to this statement in Plaintiffs' Exhibit

order of the trial court, Appellants fail to set forth the actual proposed instruction to permit review for assessment of error, if any. The record reveals that an initial requested instruction related to "issue preclusion" was withdrawn and a substituted handwritten proposed instruction was provided, but apparently was never made a part of the record. The transcript from the charge conference shows that Appellants' attorney requested a jury instruction related to issue preclusion, which was refused. However, because the content of the requested instruction is not included in the record on appeal, we have no means of knowing its contents, whether it was misleading, confusing, argumentative and/or whether it contained a correct statement of the law. Thus, we find no error in the trial court's failure to give the instruction. *Wofford v. Mental Health Services, Inc.*, 1997 OK 116, ¶16, 946 P.2d 1149, 1153.

The trial court properly permitted witness Pascarella's testimony.

Appellants contend the trial court committed reversible error when it allowed Robert Pascarella to testify as a corporate representative and/or expert witness for Ford Motor Company upon denial of Appellants' Motion to Strike and Motion for Sanctions. Appellants' argument on this issue includes the rehashing of a discovery dispute concerning the inadequacy of Mr. Pascarella as a corporate representative witness arising from his lack of knowledge and/or unfamiliarity with respect to several subject categories identified in Plaintiffs' deposition notice pursuant to

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#183 to the extent that Defendants were precluded from, by oral testimony, refuting or contradicting the language contained in the above-referenced statement.

12 O.S. §3230(C)(5)[15]. The record demonstrates that Ford had objected to the 38 areas of examination requested in the notice on the basis that they were vague, unduly burdensome, overly broad and ambiguous. The record further reflects that the parties thereafter had agreed to a modification of the areas of examination and that Mr. Pascarella would be presented as a corporate representative to testify on the limited topics in his §3230(C)(5) deposition notice. Given the fact that the parties resolved this discovery dispute and limited the categories of examination of Mr. Pascarella by consent, the Appellants cannot now complain of any error of the trial court with respect to Mr. Pascarella's failure to adequately address 19 of the 38 areas of examination noted in the original notice.[16]

We apply a clear abuse of discretion standard to the admissibility of expert witness testimony. *See Worsham v. Nix*, 2006 OK 67, ¶39, 145 P.3d 1055, 1068, "It is incumbent upon a trial judge in his/her role as the 'gatekeeper' of the evidentiary process to screen evidence, *i.e.*, to determine its relevance and reliability." *Cities Service Co. v. Gulf Oil Corp.*, 1999

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[15] This is the statutory provision pertaining to notice to a corporate deponent.

[16] The record contains correspondence of counsel reflective of an agreement that Mr. Pascarella's testimony as a corporate representative would be limited to the wheel bearings, hub assembly and cotter pin issues in the 2001 Ford Expedition. Counsel for Ford identified at least one additional corporate representative knowledgeable on other issues pertinent to the §3230(C)(5) deposition.

OK 14, ¶32, 980 P.2d 116, *cert. dismissed*, 528 U.S. 1014 (1999).[17]

Appellants assert the trial court erred in permitting Mr. Pascarella, an automotive mechanical engineer, to testify regarding metallurgy, given his admission he was not an expert on that subject. A review of the trial transcript, however, reveals Mr. Pascarella did not testify on the subject of

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[17] Appellants additionally argue (in part VII of their appellate Brief-in-Chief) the trial court abused its discretion in excluding Appellants' expert witness testimony regarding information contained within Ford's Master Owners Relation System ("MORS"). Appellants cite 12 O.S. §2703, which authorizes expert witnesses to base their opinions on inadmissable evidence, as authority for the admissibility of testimony concerning the content of such otherwise inadmissable material. First, we note Appellants fail to demonstrate, by specific reference in the record, the content of the MORS to permit meaningful review. Further, Appellants fail to demonstrate whether MORS is of a type of data reasonably relied on by experts in the particular field in forming opinions or inferences on the subject. Admission of such evidence relied upon by experts in formulating their opinions is within the discretion of the trial court. *See Ake v. State*, 1989 OK CR 30, ¶31, 778 P.2d 460, 467. Furthermore, counsel for Plaintiffs represented to the court during a pre-trial hearing on the parties' motions in limine on August 17, 2005 that this MORS evidence was hearsay and that it would be used "strictly in the punitive damages case that we get to that, Your Honor. . . . [T]hose are records that we offer in the second phase of this trial to show that they knew that people would be killed before my clients were killed." Despite these assurances concerning the limited use of this evidence, Appellants nevertheless sought expert testimony thereon during the negligence phase of trial. The trial court, in its exercise as gatekeeper in the screening of evidence, sustained the defense's objections thereto. The Appellants have failed to demonstrate any abuse of discretion in the trial court's exclusion of testimony concerning MORS.

metallurgy.[18] In fact, during his trial testimony, Mr. Pascarella expressly deferred to another expert witness on the subject of metallurgy. Clearly, Appellants' allegation of error on this point is without merit.

Finally, Appellants argue the trial court erroneously permitted Mr. Pascarella to present his "driving tests" to the jury in support of his opinion that the forces of the accident broke the wheel bearing. Appellants cite no authority in support of this allegation of error and we therefore will not consider it. *See Abel v. Tisdale*, 1980 OK 161, ¶18, 619 P.2d 608, 611.

After reviewing the testimony in this case, we find the testimony of Robert Pascarella would assist the jury in understanding the issues in the case and in determining liability in this contested case.[19] The court did not abuse its discretion by allowing Mr. Pascarella to testify.

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[18] Metallurgy is defined as the knowledge and study of metals and their properties in bulk and at the atomic level. AMERICAN HERITAGE DICTIONARY 789 (2d ed. 1985).

[19] Appellants' argument on this issue includes a statement to the effect that they "had brought to the trial court's attention facts that strongly suggested Mr. Pascarella had either planted or facilitated the planting of misleading evidence at the accident scene." Expert witnesses were cross-examined regarding the finding of previously missing parts (including a cotter pin) at the scene of the accident in August, 2004. Expert witness testimony included commentary that the late discovery of the parts was surprising, but none had evidence to suggest that the parts did not come from the subject vehicle or that the parts were planted. It was a question of fact for the jury whether the parts found at the scene came from the subject vehicle.

The trial court properly granted summary judgment to Reynolds Ford on the issue of negligence.

Appellants maintain the trial court erred in its pretrial granting of Reynolds Ford's Motion for Summary Judgment on the issue of negligence.[20] The appellate standard of review of a trial court's grant of summary judgment is *de novo*. *Kirkpatrick v. Chrysler Corp.*, 1996 OK 136, 920 P.2d 122. This Court will examine the pleadings and evidentiary materials submitted by the parties to determine if there is a genuine issue of material fact. *Ross v. City of Shawnee*, 1984 OK 43, ¶7, 683 P.2d 535, 536. All inferences and conclusions to be drawn from the evidentiary materials must be viewed in the light most favorable to the non-moving party. *Id.*

Appellants' theory of negligence against Reynolds Ford, the dealership from which the Smiths purchased the used Expedition, was generally that it failed in its inspection of the vehicle to discover the alleged defect in the inner wheel bearing. The evidence presented in support of Appellants' defect theory (*i.e.*, that there was "a fatigue failure of the inner bearing, the race on the inner bearing cone, left front wheel, that precipitated the accident")[21] was

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[20] Although Appellants list the trial court's granting of Reynolds Ford's Motion for Summary Judgment on the issue of fraud as an allegation of error in their Petition in Error, they failed to brief the issue. We note that Appellants listed numerous allegations of error in their Petition in Error which were not briefed. Allegations of error not contained within arguments in appellate brief are waived. *Johnson v. Ford Motor Co.*, 2002 OK 24, 45 P.3d 86.

[21] (Depo Tr. Dr. Robert Block at 10). Appellants' expert witnesses also described the defect as a fracture or crack, which started below the surface of the bearing race and progressively moved to the surface.

discerned by Appellants' expert witnesses upon examination of parts under an electron microscope. The record reflects inspections were performed on the Expedition at Reynolds Ford including a test drive and multi-point inspection[22] in July, 2003, which revealed no defects in the Expedition. Appellants' expert witness metallurgist testified that Reynolds Ford could not have found the alleged fracture in the inner bearing race upon inspection if it had not reached the surface. Appellants presented no evidence that the fracture, if any, had reached the surface at the time the vehicle was at Reynolds Ford.

Given the aforementioned facts, Reynolds Ford argued Appellants failed to establish the existence of a defect and therefore, cannot be held liable for failure to discover same upon inspection. Secondly, Reynolds Ford argued that even if there was a failure in the left front inner bearing race on the Expedition at the time the vehicle was at Reynolds Ford, the evidence clearly demonstrates that a reasonable inspection by Reynolds Ford could not have revealed such a latent defect on the inner race.

While a used car dealer is not an insurer of safety of the vehicles it sells, it has a duty to exercise

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[22] Appellants' argued that had Reynolds Ford performed a "Quality Checked" 115-point inspection, it would have discovered the defect, although they failed to produce evidence to support this assertion. The record demonstrates that the vehicle was not in the Quality Checked program. Additionally, the record reflects deposition testimony of the Reynolds Ford technician who performed a brake inspection of the vehicle as well as a check for loose bearings (this involved grasping the wheel at the top and at the bottom and shaking). Appellants' experts testified this inspection would have revealed a loose or "bad" bearing, if any.

reasonable or ordinary care in making inspections and tests to discover defects which would make the used car dangerous to those who may use it or come in contact with it. *Hembree v. Southard*, 1959 OK 91, 339 P.2d 771; *see Bower v. Corbell*, 1965 OK 163, 408 P.2d 307, 314 (quoting with approval *McKinney v. Frodsham*, 57 Wash.2d 126, 356 P.2d 100, which determined an automobile dealer "is not required to dismantle the car to make inspection, but is required to observe the vehicles as received, observe whether they operate properly, and investigate and check the operation of parts or appliances with respect to safety before delivery.").

In this case, Reynolds Ford's inspection went well beyond a mere cursory inspection of the vehicle, but stopped short of dismantling the vehicle and inspecting parts under a microscope. Even Appellants' expert witnesses acknowledge it would not have been part of the standard inspection procedure to remove the wheel bearings to inspect them, and that a crack in the inner bearing race, if detectable at all, would only be detectable by extraordinary measures. The evidence was undisputed that Reynolds Ford satisfied its legal duty to perform a reasonable inspection and was entitled to judgment as a matter of law. The trial court correctly granted Reynolds Ford's Motion for Summary Judgment on the issue of negligence.

AFFIRMED.

BUETTNER, P.J., and BELL, J., concur.

APPENDIX B

IN THE SUPREME COURT OF
THE STATE OF OKLAHOMA

[Filed February 17, 2009]

THE CLERK IS DIRECTED TO ENTER THE FOLLOWING ORDERS OF THE COURT:

104,134 Mickey A. Smith and J. Scott Brown, as co-personal representatives of the Estate of Elizabeth A. Smith, Deceased and the Estate of Noah Scott Smith, Deceased, et al v. Marcus Allen Austin, independent executor of the Estates of Milton Andrew Austin and Thelma Susie Austin v. Ford Motor Company, et al
Petition for certiorari is denied.
CONCUR: Edmondson, C.J., Taylor, V.C.J., Hargrave, Opala, Watt, Winchester, Reif, JJ.
DISSENT: Colbert, J.
NOT PARTICIPATING: Kauger, J.

104,564 Earl & Barbara Patzkowsky, et al v. State of Oklahoma, ex rel., Oklahoma Board of Agriculture, et al
Petition for certiorari is denied.
CONCUR: Taylor, V.C.J., Hargrave, Opala, Watt, Winchester, Colbert, Reif, JJ.
DISSENT: Edmondson, C.J., Kauger, J.

105,136 The Lions Club of the City of Del City, Oklahoma, a charitable corporation v. Larry Derryberry, et al
Petition for certiorari is denied.
ALL JUSTICES CONCUR

105,602 Harry ("Pip") Blue and Brenda Blue dba P.B.R. Equipment Sales & Services, an

Oklahoma corporation v. CVS Pharmacy, Inc., a foreign corporation doing business in Oklahoma
Petition for certiorari is denied.
ALL JUSTICES CONCUR

105,647 Don Marvin McKee v. Superior Pavement, et al
Petition for certiorari is denied.
CONCUR: Edmondson, C.J., Taylor, V.C.J., Opala, Kauger, Watt, Winchester, Colbert, Reif, JJ,
NOT PARTICIPATING: Hargrave, J.

105,850 Hillcrest Medical Center, et al v. Patrick Collins and The Workers Compensation Court
Petition for certiorari is denied.
ALL JUSTICES CONCUR

106,622 Kim Annette Mashunkashey v. The Honorable B. David Gambill, Judge of the District Court of Osage County, 10th Judicial District, State of Oklahoma, et al
Application to assume original jurisdiction is denied.
All requested relief is denied.
ALL JUSTICES CONCUR

/s/ James Edmonson
CHIEF JUSTICE